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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY A. GLAZIER,

Defendant and Appellant.

C067274

(Super. Ct. No.  
TF033953A)

Defendant Timothy A. Glazier pleaded guilty to sexual intercourse with a minor more than three years younger than defendant and oral copulation with a person under 18. The trial court placed defendant on formal probation for five years, with terms and conditions including 120 days in jail, and reserved jurisdiction regarding imposition of victim restitution. The trial court subsequently imposed \$119,397.15 in victim restitution without holding a restitution hearing. The record

does not indicate that the trial court served defendant with the restitution order.

Over a year later, the probation officer reported that defendant violated his probation by not paying restitution. Defendant moved for a restitution hearing. The trial court discharged the allegation that defendant violated his probation, denied defendant's motion for a restitution hearing, and reiterated its prior order of \$119,397.15 in victim restitution.

Defendant contends the trial court erred in ordering restitution without a restitution hearing. The Attorney General responds that we should dismiss defendant's appeal as untimely.

We conclude that defendant's appeal was timely and that he is entitled to a restitution hearing. We will reverse the restitution order and remand for such a hearing.

#### BACKGROUND<sup>1</sup>

Defendant entered his guilty plea on January 6, 2009, pursuant to a plea agreement. Articulating the terms of the plea agreement at the plea colloquy, the prosecutor said, "Defense Counsel has been put on notice that the People anticipate a large request for restitution, approaching the amount of \$126,000, which is what the victim's father paid for her therapy based on this case. We understand there are some other issues out there and that there will be a restitution hearing and we will have to prove out restitution. So as far as

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<sup>1</sup> The facts regarding defendant's underlying offenses are not relevant to the issue on appeal and are not set forth.

today, restitution will just be referred out to Probation for determination of restitution." Defense counsel added that the victim had been in treatment prior to the crimes for pre-existing conditions, and the defense would need discovery to determine the extent to which particular treatment was related to this case.

The trial court took defendant's plea. After defense counsel waived the presentence report and arraignment for judgment and sentencing, the trial court pronounced sentence and reserved jurisdiction regarding victim restitution, directing the San Joaquin County Probation Department (Department) to prepare a report on restitution. The trial court indicated that upon receipt of the report, it would transmit copies to defendant, defense counsel, and the People.

The trial court then stated, "If the court fixes the amount of restitution based on that recommendation and the defendant agrees with the amount of restitution ordered, the restitution will be paid directly through the Probation Department of San Joaquin County. If on the other hand, the defendant disagrees with the recommendation or any court order, he may request and receive a restitution hearing as provided by law."

On March 2, 2009, the Department filed a supplemental report on victim restitution with the trial court. The one-page report stated the victim's father sent a restitution request seeking \$119,397.15 in restitution, and the Department recommended that defendant be ordered to pay this amount in victim restitution. The report contained no other evidence or

allegations supporting the requested restitution. There is no indication in the record that the report was served on defendant, defense counsel, or the People.

On March 5, 2009, the trial court issued a written order directing defendant to pay \$119,397.15 in victim restitution in a manner determined by the "Treasurer/Tax Collector -- Revenue & Recovery Division[.]" None of the parties were present when the trial court issued its order, and there is no evidence in the record that notice of the order was served on defendant, defense counsel, or the People.

On June 29, 2010, the Department filed a report alleging that defendant violated his probation by failing to pay victim restitution. Defense counsel filed a reply with the trial court on August 25, 2010, stating that the defense was "still waiting for discovery that explains how the restitution amount suggested by the prosecution is justified." Defense counsel said that until such discovery was provided, the defense was not in a position to contest the amount of restitution at a hearing. Defense counsel argued it was premature to hold defendant responsible for failing to pay restitution because it had not been established what amount of restitution is appropriate, or even whether defendant should pay any restitution. Defendant turned over each bill for restitution to defense counsel, who told defendant not to pay, as payment might be interpreted as accepting the claimed amount of restitution. Defense counsel concluded: "As we have made clear during the plea negotiations, during the plea, during the sentencing, and again in each

subsequent conversation with the prosecution in this case, we intend to contest the amount of restitution claimed, and to suggest to this court that most of the expenses are completely unrelated to [defendant's] crimes[.]” Defense counsel asked the trial court to postpone the hearing on the probation violation until the defense received the necessary discovery.

On October 27, 2010, the People filed a memorandum of points and authorities on restitution. The People asserted that defendant was notified of the restitution order in a letter dated March 9, 2009, but he failed to make any restitution. The memorandum related the facts underlying the restitution claim and asserted that the victim's family had submitted receipts demonstrating their expenses.

Defense counsel filed a motion for a restitution hearing on January 7, 2011. The motion contained a timeline of the relevant events, noting that defense counsel was hospitalized for congestive heart failure on February 17, 2009, and had triple bypass surgery on August 17, 2009. Defense counsel asserted that he and defendant had not been given notice of the Department's March 2, 2009 restitution report or the trial court's March 5, 2009 restitution order.

Defense counsel admitted that on March 9, 2009, the Department sent a letter to defendant stating that restitution in the amount of \$119,397.15 had been established. Defendant gave the letter to defense counsel, who then wrote a letter to the San Joaquin County Revenue and Recovery Division on May 1, 2009. In the letter, defense counsel stated that there was no

court order regarding restitution, and the defense expected a restitution hearing on the matter in the future. On May 12, 2009, defense counsel wrote another letter to the Department and the Revenue and Recovery Division, declaring that defense counsel would be unavailable until June, and that the defense would expect a restitution hearing to be set up after his return. The Department continued to send bills to defendant between May and June 2009, but defense counsel kept advising defendant not to pay the bills until ordered by the trial court. On July 19, 2010, a probation violation hearing was set and defense counsel informed the prosecution that the defense still objected to any amount of restitution that was not properly documented at a hearing.

According to defense counsel, he did not learn about the March 5, 2009 restitution order until the trial court made an offhand reference to it at a December 1, 2010 hearing. Before that remark, defense counsel thought the only document in the case even alluding to an order was the restitution determination by the Department and the subsequent bills sent by the Revenue and Recovery Division. Defense counsel reiterated defendant's objection to restitution without a hearing, and asked the trial court to order additional discovery and set a restitution hearing. Copies of the relevant letters were appended to the motion.

Defendant's motion for restitution hearing was heard on January 13, 2011. After reading the points and authorities and engaging in extensive discussions with the parties, the trial

court believed the real question was, "has the amount of restitution been waived given the stature of the case at this point with the notice being sent previous." Defense counsel reiterated that the March 2009 restitution order was entered without notice to the defense, as was the Department's report. Defense counsel asserted there were substantial factual issues concerning restitution, and that he was not at the "top of [his] game" around the time of the restitution order because he was suffering from congestive heart failure.

The trial court stated the March 5, 2009 restitution order was mailed to defendant. Defense counsel countered: "The Court order was never mailed to the defendant." The trial court replied: "That, well -- that is standard court process. There is an order set. If he, whether he got it or not, I don't know. If he is going to tell me he didn't get it, that --." Defense counsel then informed the trial court that the restitution order was entered by a different judge than the one who took the plea.

After pointing out the letter to defendant from the Department and counsel's reply letters, the trial court declared, "That is notice to the defendant and your office that is the amount set." Since "[n]o one came forward to ask for a restitution hearing after that correspondence," the trial court concluded, "the presumption is [defendant] was on notice, and for whatever reason, there are many reasons why people then decide not to go forward, drop the matter." In further colloquy with defense counsel, the trial court stated that defense

counsel's letters indicated he knew the amount of restitution "and you were coming forward from that date."

The trial court ruled defendant was provided an opportunity to be heard and present evidence, but did not take advantage of his right to come forward. The trial court denied defendant's motion for a restitution hearing and set restitution at the previously determined amount.

#### DISCUSSION

##### I

We first address whether defendant filed a timely notice of appeal. Defendant filed his notice of appeal on January 27, 2011, within 60 days of the order denying his motion for a restitution hearing, but more than a year after the March 5, 2009 order setting restitution.

The Attorney General contends we should dismiss the appeal as untimely, citing Rule 8.308 of the California Rules of Court.<sup>2</sup> Subdivision (a) of that rule provides that, subject to certain exceptions, a notice of appeal must be filed within 60 days after the "making" of the order being appealed. The Attorney General argues that because defendant did not file his notice of appeal within 60 days of the 2009 restitution order, he forfeited his claims on appeal.

Defendant disagrees, relying on *Conservatorship of Ben C.* (2006) 137 Cal.App.4th 689 (*Ben C.*) for the proposition that the

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<sup>2</sup> Undesignated rule references are to the California Rules of Court.



"making" of an order does not occur for purposes of appeal until the order is conveyed in open court. Defendant contends that the restitution order was not conveyed in open court until January 13, 2011, when the trial court denied his motion for a restitution hearing and reiterated the prior restitution order. Because defendant filed his notice of appeal within 60 days of the January 13, 2011 order, he contends his notice of appeal was timely.

In *Ben C.*, a number of conservatees filed petitions for reimbursement of expert costs concerning conservatorship proceedings under the Lanterman-Petris-Short Act. (*Ben C.*, *supra*, 137 Cal.App.4th at p. 691.) The trial court took the petitions under submission at a hearing in August 2004. (*Id.* at p. 694.) On September 22, 2004, the trial court filed a written decision denying the petitions but did not mail the decision or serve it on anyone. (*Id.* at pp. 694, 695.)

The conservatees filed another round of petitions seeking to recover the expert costs, which were heard at a December 2004 hearing. (*Ben C.*, *supra*, 137 Cal.App.4th at p. 694.) At that hearing, the trial court denied the second set of petitions, "stating [that the trial court] had previously issued a ruling denying the petitions in September 2004 and that the ruling was in the court file." (*Ibid.*)

In January 2005, some of the conservatees filed notices of appeal from the September 2004 order denying costs. (*Ben C.*, *supra*, 137 Cal.App.4th at p. 695.) The Court of Appeal first observed that some appeals in conservatorship proceedings are

governed by the rules applicable to noncapital criminal cases, and that the critical question was "whether the Conservatees timely filed their notices of appeal within the allotted time [60 days] after the 'making of the order' being appealed."

(*Ibid.*) Relying on this court's decision in *In re Markaus V.* (1989) 211 Cal.App.3d 1331, the Court of Appeal asserted, "when an order is pronounced in open court, the time to appeal from the order begins to run when the order is pronounced.

[Citation.] . . . [¶] . . . Because the order denying the petitions was not made in open court until December 15, 2004, the appeals here are timely." (*Ben C., supra*, 137 Cal.App.4th at pp. 695-696.)

In this case, the original restitution order was not pronounced in open court. Moreover, as we conclude in part II of this decision, defendant was denied his right to a restitution hearing. In addition, there is no indication in the record that the trial court ever served defendant with notice of the 2009 restitution order.

The Attorney General repeats the trial court's comment that mailing a copy of the order to the parties is standard practice in San Joaquin County. Thus, the Attorney General asks us to presume "that official duty has been regularly performed" and presume notice was mailed to defendant. (Evid. Code, § 664.) On this record, however, we decline to make such a presumption. The trial court indicated that mailing is "standard court process" but then added, "whether he got it or not, I don't know." The trial court instead presumed notice because

defendant received a letter from the Department indicating that a restitution amount had been established, and also received monthly bills. But the record also indicates that defense counsel believed the Department was wrong in asserting a restitution amount, because defendant had not received the needed discovery or an order from the trial court, and no restitution hearing had occurred.

We are sensitive to the delay of victim restitution in this case. It would have been preferable if the parties had gone back to the trial court for clarification sooner than they did. But that does not change the dispositive facts that the restitution order was issued without a restitution hearing and without a proof of service on defendant and his counsel.

Because the record indicates that defendant filed his notice of appeal within 60 days after the trial court communicated to defendant that it had determined a restitution amount, defendant's notice of appeal was timely.

## II

Defendant asserts the restitution order violated the plea agreement and his due process rights.

A defendant has a due process right to a restitution hearing. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86.) The trial court made the initial restitution award without a restitution hearing, a violation of defendant's due process rights. The remedy is to reverse the order and remand for a restitution hearing.

DISPOSITION

The trial court's order imposing victim restitution is reversed and the matter is remanded to the trial court for a restitution hearing.

\_\_\_\_\_, MAURO, J.

We concur:

\_\_\_\_\_, RAYE, P. J.

\_\_\_\_\_, BUTZ, J.